WHAT IS THE POLICE POWER?

No phrase is more frequently used and at the same time less understood than the one which forms the subject of the present discussion. It is a common thing for our courts to say that the police power does not admit of an exact definition, yet only a few of those who make the remark appear to understand clearly why this should be so. As the eminent holder of the Roosevelt Professorship in Berlin has so well said:

"The police power is the dark continent of our jurisprudence. It is the convenient repository of everything for which our juristic classifications can find no other place."[1]

In what follows an attempt will be made to show why it is that this confusion with reference to the police power exists, and also that, with certain limitations, the description of this power by Mr. Burgess must always hold good so long as the fundamental principles of our constitutional system remain what they are.

As a convenient method of approaching our subject, let us examine briefly the definitions or descriptions given by two or three writers who have studied the problem with a considerable degree of thoroughness. The author whose words have already been quoted, after showing the apparent confusion of the Supreme Court of the United States upon the question, begins with the derivation of the words from the Greek and traces their introduction into the political science of modern Europe and their history since, and concludes by stating what he conceives to be the most recent view of political science upon the scope of the police power, closing as follows:

"The political science of the present century has resurveyed the field of the police power, and has brought out four very fundamental distinctions in regard to it. The first is, that the police power is, in its nature, administrative, not legislative or judicial; the second is, that it is not co-extensive with the whole scope of internal administration, as distinguished from external, but is only a branch of internal administration; the third is, that, in the exercise of the police functions, the executive discretion should move within the lines of general principles prescribed either by the constitution or the legislature; and the fourth is, that the community in its most local organization should participate, so far as

[1] Burgess, Political Science and Comparative Constitutional Law, II, 136.

possible, in the exercise of the police power. * * * Every right acknowledged to the individual by the state may be abused by him to the detriment of the state. The state must therefore confer upon the government the power to *watch for and prevent* such abuse. This is the police power."[1]

The most noteworthy thing about this treatment of the subject is that the problem is treated as being purely one in political science as distinguished from constitutional law. The author is describing the meaning which ought, in his opinion as a political scientist, to be given to the phrase "the police power;" or perhaps a more accurate statement would be, that he is describing the limitations which he thinks ought to be imposed by the constitution upon the government in behalf of individual liberty. This clearly appears from the following criticism of the Supreme Court of the United States which is found in the paragraph next following the one from which we have just quoted:

"Its (the Supreme Court's) theory of the extent of the police power is, in the political science of to-day, obsolete."

Even admitting, for the sake of argument, that the statement just quoted is correct, it by no means follows that the Supreme Court is wrong, for that tribunal is not administering the principles of modern political science, but is occupied in deciding cases as they arise, in accordance with the principles of our constitutional law, and it may well be that the latter gives a wider scope to what may properly be called the police power than a writer on political science would consider desirable. Moreover, as we shall see in a moment, the political scientists do not seem to be, as yet, quite agreed among themselves upon the subject. This discussion does not, therefore, inform the student of our system just what is included under the term "police power" as that phrase is used in our constitutional law.

The author of the most recent and without doubt the most valuable treatise upon the police power[2] pursues an analytical rather than an historical method in dealing with the subject. He begins[3] by making an analysis and classification of the objects of government in the abstract, finding them to fall into three classes: (1) the maintenance of national existence; (2) the maintenance of right, or justice; (3) the promotion of the public welfare. Under

[1] Burgess, op. cit. I, 216.
[2] Freund, The Police Power.
[3] Id., p. 3.

the first he includes international relations, governmental organization and support, war, and the putting down of internal revolt and insurrection; under the second, the administration of civil and criminal justice; under the third, not merely the prevention of wrongful acts but the imposition of positive regulations designed to promote the general welfare. The general welfare, he finds, "embraces a variety of interests, calling in different degrees for public care and control. They may be classified as follows: the primary social interests of safety, order and morals; economic interests; and non-material and political interests."[1] The police power, he concludes, is occupied with the accomplishment of the objects which fall under the third class. The essence of the police power, then, is the exercise of control for the purpose of promoting the general welfare.

Here again we have a solution of our problem which pursues the methods of the political scientist rather than those of the constitutional lawyer, the difference being that this time the analytical is substituted for the historical method. Mr. Freund's conclusion, however, as to the scope of the police power is obviously far different from that of Mr. Burgess.

Let us now turn our attention to the discussions of a third writer whose valuable contribution to the literature of the subject is too little known to the legal profession generally, owing, doubtless, to the place of its publication.[2] Like Mr. Burgess, Mr. Hastings pursues the historical method, but with this difference, that he writes as a student of constitutional law rather than as a political scientist; that is to say, he traces the history of the phrase in the discussions of American constitutional laywers, particularly in the opinions of the judges of the Supreme Court of the United States, seeking thus to ascertain the meaning which the phrase has come to have when used by the courts. It is difficult to state his conclusion without giving to one who has not had the pleasure of reading his discussion an erroneous conception of his meaning. He says:

"The police power is a fiction. Every judge whom we have seen attempt to analyze it finds in it Madison's 'indefinite supremacy' of the state * * *. The term is certainly a mere abstract and collective

[1] Freund, op. cit. p. 7.

[2] W. G. Hastings: The Development of Law as Illustrated by the Decisions relating to the Police Power of the State. Proceedings of the American Philosophical Society, Sept. 1900. Also printed for private distribution.

one for the state, where regarded as employed in certain functions, and the constant forgetting of this fact has made endless trouble."[1]

Mr. Hastings, then, from a study of the use of the phrase by the courts, considers it as standing for the "indefinite supremacy" of the State; as another name for the State when employed in certain functions. This may all be true enough—and, as I shall show later, I think it is—but it is a bit too vague to be entirely satisfactory.

In the remainder of this article I propose to attempt to formulate a definition, or perhaps better, a description, of the police power by doing two things, viz.: (1) by tracing briefly the history of the phrase, "the police power" in American law, and (2) by analyzing our constitutional system with reference to the distribution of governmental power between the national government and the States, in the belief that by a combination of these two methods a reasonably clear conception of what the police power really is can be obtained. Let us then first glance, very briefly indeed, at the history of the phrase. For our purposes I think we need not go farther back than the constitutional convention of 1787 which framed our present constitution. At that time a phrase somewhat similar to the one we are discussing seems to have been in more or less general use. On July 17th, in discussing the sixth resolution of the Committee of the Whole, which empowered the national congress "to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation," Mr. Sherman of Connecticut proposed in its place to insert: "to make laws binding on the people of the United States in all cases which may concern the common interests of the Union; but not to interfere with the government of the individual States in any matters of *internal police* which respect the government of such States only, and wherein the general welfare of the United States is not concerned." This proposition had the support of Mr. James Wilson, but was opposed by Mr. Gouverneur Morris on the ground that "the internal police, as it would be called and understood by the States, ought to be infringed in many cases, as in the case of paper-money, and other tricks by which citizens of other states may be affected." This discussion is interesting in that it seems to show that the phrase "internal police" was used to signify the whole power of internal govern-

[1] Hastings, op. cit. 191.

ment which would remain in the hands of the States when the powers enumerated had been vested by the constitution in the national government, this being, in general, a power to promote the general welfare of the inhabitants of the State. Another instance of the use of the phrase is found in a report of a special committee made to the convention on August 22d. The question at once arises: Is there any connection between the two phrases? I believe that there is, and that a study of the subsequent history will show that the one was substituted for the other, and that the more modern phrase, "the police power," is to-day used by our courts in much the same sense that the earlier phrase was used in the convention by the framers of the constitution. As Mr. Hastings has shown, Chief Justice Marshall seems to be entitled to any credit that may be due for the introduction of the modern phrase.[1] Space fails me to trace the evolution in detail, but it is sufficient to point out that we find the chief justice using in 1824[2] the phrase "internal police," while in 1827 he substitutes for it "the police power."[3] This is taken up by Judge Barbour in 1837[4] and we find him saying:

"We choose to plant ourselves on what we consider impregnable positions. They are these: That a State has the same undeniable and unlimited jurisdiction over persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty, of a State to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called *internal police*, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified and exclusive."

He then goes on to describe the scope of this police power (as he calls it in another passage), and includes within it, apparently, the sum total of the powers of government left in the States by the constitution of the United States, thus making it co-extensive with what the authors of *The Federalist* call "the residuary sover-

[1] Hastings, op. cit. 10.
[2] Gibbons *v.* Ogden, 9 Wheat. 1, 210.
[3] Brown *v.* Maryland, 12 Wheat. 419.
[4] New York *v.* Miln, 11 Pet. 102.

eignty" of the States. Thus far, then, the phrase seems to mean very much what we may guess was meant by Sherman and Morris when they were discussing the powers of "internal police" which the States would have under the new constitution. In later opinions of the Supreme Court, however, we find a somewhat narrower statement of the scope of the police power to which I shall call attention later.

Leaving for the time being the field of history, let us turn our attention now to the making of a brief survey of the distribution of governmental power in the American constitutional system. This distribution may be described as follows: First, the constitution denies to any government in our system, including, therefore, both the national government and the States, the exercise of certain powers, the right to do certain things—for example, in the Thirteenth Amendment forbidding slavery. The power to do any of these things, then, is under the constitution vested exclusively in the bodies charged with the amendment of the constitution itself. Second, of the remaining powers which may conceivably be exercised by a government, the constitution vests a portion in the government of the United States, so that, to use the technical phrase, the government of the United States is a government of enumerated powers. The word "enumerated" here, of course, includes not only those powers expressly mentioned but also all powers incidental to one or more or all of the powers expressly delegated.[1] Examining these powers in the light of the decisions of the Supreme Court of the United States, we find that for our purposes we must classify them into two groups: (a) powers vested exclusively in the national government; (b) powers not exclusively vested in the national government. With respect to those falling under (a), it is obvious that there is implied a denial of power to the States to exercise them; with respect to those under (b), it is of course the recognized principle that the States may exercise these powers, subject always to the proviso that, whenever the State statute is inconsistent with an act of Congress, passed in pursuance of its power to regulate the same

[1] Compare Sec. 51–xxxix of the Australian constitution, which reads as follows: The parliament (of the national government) shall, subject to this constitution, have power to make laws for the peace, order, and good government of the Commonwealth, with respect to: Matters incidental to the execution of any power vested by this constitution in the Parliament or either house thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

matter, the State law must yield so long as the act of Congress remains in force.[1]

All other conceivable powers of government not included in the foregoing are delegated to, or, as some perhaps would prefer to say, left with the States. The States, therefore, in our system possess an indefinite, though clearly not an unlimited, residuum of governmental power. This necessarily must be so unless, as in Canada, we reverse the process and make the central government the residuary legatee of governmental power and the States simply governments of enumerated powers. It will not and can not, I think, be disputed that it is necessary in any system to vest residuary governmental power, i. e., authority to do anything which has not been forbidden expressly or by implication, in some department of the government. To maintain the contrary would be to assert the feasibility of enumerating in the constitution all the powers which a government should exercise. With us then, this indefinite residuary power to govern is vested or left by the constitution of the United States in the States.[2]

If now we examine this residuum of governmental power more closely, we shall find that it includes the power to accomplish in part all three of the objects for which, according to Mr. Freund, all governments exist. In the first place, we find a power in each State to maintain its existence by putting down insurrection and rebellion within its limits, by laying and collecting taxes, by taking private property for public purposes, etc. At the same time, we find that this power is not a complete one, the State being compelled by the constitutional provisions to rely in part for the maintenance of its existence upon the national government.[3] Again, we find that the maintenance of right, or justice, i. e., the administration of civil and criminal justice, is very largely but not wholly vested in the States. The same is true with reference to the accomplishment of the third class of objects, viz., the promotion of the public welfare. In fact, the power of the States in our system to promote the public welfare

[1] Compare the Australian Constitution, which expressly provides in Sec. 109: When a law of a state is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall to the extent of the inconsistency, be invalid.

[2] Of course, I am referring here only to the parts of the United States which are organized into states. In the remaining portions the residuary powers of government are of course vested by the constitution in the Congress of the United States. Art. IV. Sec. 3.

[3] Constitution of the United States, Art. I, Secs. 8 and 10; Art. II, Sec. 2, etc.

is the residuum of governmental power left after subtracting from the sum total of the States' residuary powers of government as described above, the powers devoted to the maintenance of existence and the administration of justice. This, otherwise unclassified, residuary power of government, necessarily of indefinite though not unlimited extent, has come to be called the police power. In other words, we have taken the residuary powers of government possessed by the States in our system—the "residuary sovereignty" of *The Federalist*—have classified and given specific names to certain parts, e. g., power of taxation, of eminent domain, etc., and then, perhaps for want of a better term, have called what is left "the police power."

It thus appears that all three of the writers whose definitions have been discussed are in part right. Mr. Burgess is entirely correct in his description of the police power as the "convenient repository of everything for which our juristic classifications can find no other place;" in fact, if I am right about it, this must always be so until we overturn our whole constitutional system. Again, Mr. Hastings is in part, at least, right when he says that the police power is "indefinite supremacy," only we must add that while the power must always remain "indefinite" it by no means follows that it is unlimited; we must interpret "indefinite" to mean simply "undefined" and "undefinable," in the sense that what can be done under it can not be enumerated; that its limits can be ascertained only by a process of finding out what can not be done rather than by describing what can be done. On the other hand, regarded in this way, the police power is not "a fiction," though it certainly is "the State, regarded as employed in certain functions."

If, then, I were to attempt a definition of the police power, I should say that it is the unclassified, residuary power of government vested by the constitution of the United States in the respective States.[1] Here we take issue with Mr. Freund. He not only

[1] Compare Mr. Justice Field's statement of the scope of the police power in Barbier *v.* Connolly (1885) 113 U. S. 27: "The power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity." Mr. Justice Field, however, seems to be in error when he says that the fourteenth amendment was not designed to interfere with the police power of the states. If by "interfere" we understand to limit or cut down the scope of the police power, it would seem that that was the very object of the amendment; in fact, any additional limitation on the power of a state to act must necessarily reduce its police power, i.e., its residuary governmental power.

asserts that the police power has for its object the promotion of the public welfare, as I quite admit that it has; but he insists on turning the proposition around and saying that whenever any governmental authority in our system is exercising a power which has for its object the promotion of the public welfare, it is exercising a police power, or the police power. Doubtless, as I have already suggested above, this may be a useful classification for the student of political science, but our problem is to find a definition of the power which will both square with the usage of the courts and also prove of help in solving constitutional problems. I venture to think that Mr. Freund's does neither. Let us look at the matter concretely. We may do this by asking the question: Has the national government a police power, or perhaps better, does it exercise a portion of the police power, using that phrase as it is used by the courts? Mr. Freund, in the light of his definition, is bound to answer the question in the affirmative, while I, under my definition, am equally bound to give a negative reply. For example: Suppose the Congress of the United States should pass a law regulating the shipment of diseased cattle from State to State. Undoubtedly this law has for its object neither the maintenance of national existence nor the administration of justice, but primarily the promotion of the public welfare.[1] Mr. Freund would therefore say that the law is passed in the exercise of that portion of the police power vested in the Congress of the United States. I should reply: That is doubtless a very useful analysis to make for some purposes, but not a helpful one in solving constitutional problems. From a legal point of view, the law, if justified, is found to be an exercise of the power of Congress to regulate inter-State commerce, and must be discussed as such. In other words, the constitutional lawyer in classifying this law passed by Congress would put it in the pigeon-hole labeled "Regulations of inter-State commerce" and not in that labeled "The police power." The constitutional problem presents itself, not as one relating to the scope of the police power but as a question of the extent of the specific power vested in Congress to regulate commerce among the States.

Should a State pass a similar law, however (Congress not having regulated the matter otherwise), we should now, as constitutional lawyers, discuss it as a police law, i. e., as an exercise of

[1] I have assumed the constitutionality of the law. It hardly seems open to question if Champion *v.* Ames (1903) 188 U. S., 321 is correctly decided.

the unclassified, residuary power of government vested in the State to promote the public welfare of its inhabitants, and, in determining the validity of the law, we should have to settle two questions: (1) is the power to make this regulation denied because vested exclusively in the national government; (2) if not, is it denied by some one of the provisions in behalf of individual liberty, e. g., due process of law, etc.? If not, then the law is a valid police law.[1] The determination of the power of Congress to pass the law under discussion as a valid exercise of its power to regulate inter-State commerce tells us very little concerning the solution of the problem as to the power of the State to pass its law. For this reason, and also because I believe that we are following substantially the usage of the courts in so doing, I suggest that it is wiser to confine the term "police power" when we are discussing constitutional problems, to this unclassified, residuary governmental power of the States. However, this is, perhaps, after all very largely a quarrel over words. The important thing, the one which I wish to emphasize, is, that even if we do say, as Mr. Freund does, that the national government has a police power, it does not help us much in solving constitutional questions; it represents a result, rather than a reason. That is, we first find that Congress may do certain things in pursuance of its power to regulate inter-State or foreign commerce, notice that this in some cases has for its object the promotion of the public welfare, and so conclude that a portion of the police power is vested in the national government. On the other hand, the situation is reversed with reference to the States. We start out with the proposition that they have a general power to promote the public welfare and therefore may act unless in the particular case the power has been denied, so that the constitutional discussion resolves itself into a question, not of what has been granted but of what has been denied.[2]

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[1] It should be noted that the residuary governmental power here called the police power is not necessarily legislative power. For example, if the state through its legislature decrees that a certain thing shall be regarded as a public nuisance (as in Lawton *v.* Steele (1894) 152 U. S. 133) and may be summarily abated by the appropriate administrative official, this official in abating the nuisance is exercising the police power of the state just as much as the legislature did in passing the law. So also if, instead of authorizing the abatement by summary administrative action, the legislature gives a court of equity the power to issue an injunction against the maintenance of the nuisance, as it did in Eilenbecker *v.* Plymouth County (1890) 134 U. S. 31, the court in issuing the injunction and committing a person for contempt for disobedience of it appears equally to be exerting the police power of the state, that is, the power of the state to promote the general welfare.

[2] It should be noted that in determining the powers of the national

From the nature of the police power, as above defined, it is evident that a work which undertakes to deal with the whole of the police power must approach very closely to being a work upon the whole subject of constitutional law, or at least the major portion thereof. We must ascertain what the State may do to promote the general welfare; we can do this, if I am right about it, only by finding out what powers are denied to the States in one of the two ways I have described, and subtracting from the result those powers which have for their object the maintenance of State existence and the administration of justice. To do this is to determine, first, what powers are vested by the constitution exclusively in the national government, and second, what powers are otherwise denied to the States. We shall therefore have to furnish a treatise: first, on the powers of the United States government: which are exclusive of the States and which are concurrent; including therefore a discussion of the commerce clause, a subject large enough to have a volume to itself; second, another treatise (or several of them) covering all the limitations imposed by the constitution in behalf of civil liberty: the prohibition of slavery and involuntary servitude in the thirteenth amendment, the question what amounts to a deprivation of life, liberty or property without due process of law, or the denial of the equal protection of the laws, under the fourteenth amendment, etc., etc., through the whole list. Moreover, we shall have a discussion of these constitutional questions running throughout the book; we shall not find the discussion of what amounts to due process of law in one chapter or section, the equal protection of the laws in another, etc.; but rather, a discussion, for example, of the power of the State to regulate railway rates in a given manner, all the constitutional questions involved being treated together. That this

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government, the task is a double one. We must first determine whether the law in question falls within one or more of the enumerations of power, for example, that it is a regulation of commerce among the states. Having done this, it is still possible that the law is invalid as being an unreasonable regulation and so a deprivation of liberty or property without due process of law, a thing the national government is forbidden to do by the fifth amendment. This fact is sometimes lost sight of in discussing the question whether regulation includes prohibition. The Supreme Court has decided in Champion *v.* Ames (1903) 188 U. S. 321, that it does, as I think, rightly. It does not follow that Congress may prohibit all interstate commerce, even if that be regarded as a regulation of commerce, for to do so might well be a violation of the fifth amendment or some other limitation. We must therefore in all cases determine both whether the law falls within the scope of the power granted and also whether or not it is prohibited by some one of the limitations in other parts of the constitution.

arrangement of the subject has some advantages is obvious, especially from the point of view of the student of government. At the same time the defects of the method are equally obvious: in the course of each discussion many constitutional provisions are involved and nowhere does one find a complete, connected statement of just what, for example, due process of law is, not with reference to one law but as a whole. Moreover, if we adopt Mr. Freund's wider definition, there is added to the already vast field a discussion of the commerce clause, not from the point of view of finding out what regulations of commerce are denied to the States, but from that of ascertaining what Congress can do for the promotion of the general welfare by virtue of its power under this clause. Logically, also, we should omit to discuss the question of whether there could be regulations of inter-State commerce by Congress which had for their objects not the promotion of the public welfare but, say, the maintenance of national existence. The same thing is true of any other power vested in the Congress of the United States; under Mr. Freund's definition it must be discussed in so far and only in so far as it may be exerted for the promotion of the public welfare. While not denying, therefore, the value of treatises on the police power as a whole, I am inclined to think that a series of treatises on the commerce clause, the thirteenth amendment, the fourteenth amendment, etc., will be of still greater utility for the student of constitutional law. Take a concrete case: a State enacts a law regulating the charges, say of grain elevators (as in the case of *Munn* v. *Illinois*[1]). Is the law constitutional? It is unless the power to act is denied to the State. The constitutional lawyer therefore runs over in his mind one by one, each one being a complete problem by itself, the various possibilities: is the exercise of this power vested exclusively in the United States government? If not, does it deprive any one of liberty or property without due process of law, or deny the equal protection of the laws, or do any other forbidden thing? If it does none of these things, then it is a valid police law.

Thus far the problem has been treated as one arising purely under the constitution of the United States. The constitutional lawyer's task is, however, not yet completed; he must reckon with the State constitution. The people of the State have not seen fit to delegate all the residuary powers of government left in their hands by the national constitution to their representatives in the State government, but have, wisely or unwisely, deemed it neces-

[1] (1876) 94 U. S. 113.

sary to impose additional constitutional limitations. To ascertain, then, the extent of the power which the State government may exert for the promotion of the welfare of the inhabitants of the State, we must still farther reduce our residuum of governmental power, which we have above called the police power, by subtracting this farther denial of power; what we have left is—still unclassified, residuary power to govern—the police power as it actually exists in any particular State. Here again the desired result is attained by determining the scope of what is to be subtracted: whatever is not denied, is granted.

It remains now, in closing, to point out that this method of treating the problem does not necessarily, and should not, lead to any narrow view of the powers of the States to promote the general welfare or—what amounts to the same thing—any undue widening of the scope of the constitutional limitations. Our courts should not forget—as apparently some of our State courts too often do—that as a result of the distribution of governmental power in our system, our states are the residuary legatees of governmental authority; that they are the bodies vested with power and authority to meet the changing needs of society, as industry and commerce develop and new forms of business and industrial organization grow up, by appropriate changes in the law: perhaps by regulating in new ways activities of the individual which in the past have been subjected to some regulation, or even, as in *Munn* v. *Illinois*, subjecting to regulation, in the interests of society, activities which at an earlier period did not need such regulation. Nor, as the late Mr. Thayer so often and so strenuously insisted,[1] should they forget that they are not the primary but only the secondary guardians of constitutional liberty. Only when an individual who thinks that his rights are being infringed chooses to call upon them for aid do they get an opportunity to pass upon the constitutionality of the statutes passed by the legislature, and it may be that this will not be done until many years after the passage of the law.[2] From this results that fundamental principle of our constitutional law that a statute duly passed by the legislative branch of the government is not to be treated as null and void because unconstitutional unless the court feel a clear and strong

[1] Thayer, Origin and Scope of the American Doctrine of Constitutional Law, 4–12.

[2] As in the case of the United States Bank, the validity of the charter to which did not come before the Supreme Court for decision until after the first charter had expired and the second had been granted. McCulloch *v.* Maryland (1819) 4 Wheat. 316.

conviction that it violates one of the provisions of the constitution in behalf of the liberty of the individual.[1] When, therefore, a statute is challenged as unconstitutional, the burden of proof is upon the shoulders of the one who makes the challenge; the State need not prove its power to act; the individual must satisfy the court of the denial of power to the State. It is especially desirable that in dealing with that vague phrase, "due process of law," the courts should bear in mind these fundamental principles. Originating in England, as the phrase did, it was used there to place limitations not upon the legislative but upon the executive branch of the government, and therefore had a very definite meaning, viz., that in dealing with the individual the executive department should proceed only in accordance with the principles of the common law or of statutes duly enacted by the parliament. Due process of law there was, and is to-day, whatever parliament enacts. Carried over into our system as a limitation upon the legislative branch of the government, the phrase at once becomes vague and uncertain. As we all know, as interpreted by the Supreme Court it amounts in substance to saying that the government must not act unreasonably; that its laws shall not be arbitrary or in violation of the fundamental principles of liberty and justice.[2] In applying this test the Supreme Court of the United States has, I think, on the whole come very near to following the principle suggested by Mr. Justice Holmes, now of the Supreme Court itself, but at that time writing as a dissenting member of the Supreme Court of Massachusetts. In discussing the validity of a law regulating relations between employer and employee, which the majority of the court were holding to be unconstitutional, he said:

"If I assume * * * that, speaking as a political economist, I should agree in condemning the law, still I should not be willing to think myself authorized to overturn legislation on that ground, unless I thought that an honest difference of opinion was impossible, or pretty nearly so."

It is in such cases as *Munn* v. *Illinois*,[3] *Davidson* v. *New Orleans*,[4] *Hurtado* v. *California*,[5] *Holden* v. *Hardy*,[6] and many

[1] As Mr. Thayer points out, when the question is one of the allotment of power by the national constitution between the national government and the states, and the enactment in question is one by a state legislature, a different principle may well govern and perhaps has governed the court in settling the constitutional question. Thayer, op. cit. 12–30; Thayer, Cases on Constitutional Law, 156–157.

[2] Hurtado *v.* California (1884) 110 U. S. 516; Holden *v.* Hardy (1898) 169 U. S. 366.

[3] (1876) 94 U. S. 113.

[4] (1877) 96 U. S. 97.

[5] (1884) 110 U. S. 516.

[6] (1898) 169 U. S. 366.

others which might be cited, that this attitude of the court clearly appears. Occasional lapses, such as, for example, that in *Norwood* v. *Baker*,[1] are sooner or later, if not expressly, at least in effect, overruled.[2] As Mr. Justice Brown said in *Holden* v. *Hardy:* "The constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the States of the power so to amend their laws as to make them conform to the wishes of their citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land. * * * We concur in the following observations of the Supreme Court of Utah in this connection: '* * * Though reasonable doubts may exist as to the power of the legislature to pass a law, or as to whether the law is calculated or adapted to promote the health, safety or comfort of the people, or to secure good order, or promote the general welfare, we must resolve them in favor of the right of that department of the government.'"

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[1] (1898) 172 U. S. 269.
[2] (1898) French *v.* Barber Asphalt Paving Co. (1901) 181 U. S. 324.